Employment Class and Representative PAGA Actions in California

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I. Introduction.
Employers with California-based employees are increasingly challenged by class actions as they attempt to navigate California’s wage and hour laws. The California Labor Code’s Private Attorney General Act (“PAGA”) adds chaos to this already complicated world. And recent cases show that the landscape for these claims is still evolving. This article analyzes the unique threats posed by class and representative PAGA actions in California, outlines some of the recent trends in California, and offers pointers regarding steps employers can take to help prevent and mitigate these claims.

II. “Collective” Employment Actions In California.
Most national employers are aware of the employment practices that can lead to collective actions under the federal Fair Labor Standards Act (“FLSA”). These include failure to pay overtime, misclassification of non-exempt employees as exempt, misclassification of employees as independent contractors, and failure to pay non-exempt employees for all hours worked. Due to the scope of these claims, collective actions under the FLSA can lead to significant damage awards, including not only the wages owed to aggrieved employees for up to three years, but also the plaintiff’s attorneys’ fees.¹

California, not surprisingly, presents a unique situation. While California-based employees may bring actions for the same types of violations (and more), these suits or representative actions are most commonly brought as class actions under California’s class action statute² or under PAGA.³ These types of actions pose a significant threat

¹ 29 U.S.C. §216(b).
² California Code of Civil Procedure (“C.C.P.”) §382.
³ California Labor Code (“LC”) §2698, et seq.
to employers, considering the numerous California-specific laws upon which the plaintiffs may rely (which have no FLSA equivalent)\(^4\) and the various statutory penalties which are available for even the smallest violations.\(^5\)

Many of California’s Labor Code provisions contain their own specific statutory penalties which may be claimed by a representative action under PAGA.\(^6\) And PAGA also allows for the recovery of civil penalties where the underlying Labor Code section does not.\(^7\) These penalties are substantial and often exceed the harm caused by the claimed violation.\(^8\) While aggrieved employees are required to split these penalties with the state, aggrieved employees often pursue statutory penalties under PAGA as a means to inflate an employer’s potential exposure, while at the same time pursuing damages under the class action device.

III. California’s Class Action Statute

The primary authority for class actions in California is C.C.P. §382. Although there are no procedures for class treatment outlined in that section, California courts have adopted class certification requirements that are substantially similar to those used in federal court. Specifically, to obtain certification of an action in California, the Plaintiff must show (1) the existence of an ascertainable class; (2) a well-defined community of interest among the class members (meaning, questions of law and fact predominate);

\(^4\) E.g., LC §§512, 226.7 (right to uninterrupted meal and rest breaks at specific times); LC §§201, 202 (final payment of all wages at time of termination or within 72 hours of resignation); LC §227.3 (immediate vesting of earned vacation); LC §226(a) (employers must provide pay statements containing detailed information with all wage payments).

\(^5\) See Section IV, infra.

\(^6\) See LC §2699(a) (“Any provision of this code that provides for a civil penalty ... for a violation of this code, may, as an alternative, be recovered through a civil penalty action brought by an aggrieved employee...”).

\(^7\) LC §2699(f)(1)-(2) (default penalties in the amount of $100 per employee per pay period for initial violation, and $200 for each employee per pay period for subsequent violations).

\(^8\) E.g., LC §226(e) (potential penalties of $250 per employee, per pay period (up to $4,000 per employee), for violation of labor code provision governing detail on pay statement).
that they are adequate class representatives; and (4) that a class action is a superior means to manage the case.\(^9\) California has its own independent body of law governing class treatment, but in the absence of California-specific authority, California courts are directed to look to federal courts interpreting Rule 23 for guidance.\(^10\)

Despite these similarities, California is known to be generally friendlier toward class actions than federal courts. In fact, California has a public policy in favor of class actions which does not exist in federal law.\(^11\) There are also several procedural rules which tend to make class actions more favorable in California court than in federal court including, for example, the scope of pre-certification discovery from parties and unnamed class members, the ability to communicate with potential class members before class certification, and the availability of pre-certification discovery to locate a new class representative if the employer proves the original class representative’s individual case to be without merit.

IV. Private Attorney General Claims Under PAGA

PAGA is codified in California Labor Code §2698, \textit{et seq}. PAGA allows “deputized” employees to bring civil actions to pursue penalties on behalf of California’s Labor and Workforce Development Agency ("LWDA") for violations of the California Labor Code.\(^12\) To become “deputized,” an aggrieved employee notifies the LWDA and the employer of the alleged misconduct. The notice provisions are specific: it must consist of “written


\(^10\) See \textit{e.g.}, \textit{Vasquez v. Superior Court}, 4 Cal.3d 800, 821 (1971)("[Rule 23] prescribes procedural devices which a trial court may find useful.").


\(^12\) \textit{Alcantar v. Hobart Serv.}, No. ED CV 11-1600 PSG, 2013 WL 146323, at *3 (C.D. Cal. Jan. 14, 2013)("must still prove Labor Code violations with respect to each and every individual on whose behalf Plaintiff seeks to recover civil penalties"); \textit{Hibbs-Rines v. Seagate Tech.}, 2009 WL 513496, *4 (N.D.Cal. March 2, 2009)("plaintiff will have to prove Labor Code violations with respect to \textit{each and every individual} on whose behalf plaintiff seeks to recover civil penalties under PAGA").
notice by certified mail to the [LWDA] and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.”

The LWDA then has 60 calendar days to elect whether to pursue the allegations.

The notice provision to the LWDA is becoming a hot topic in litigation. The purpose of the notice is twofold. First, it signals to the LWDA that a dispute has arisen and provides the LWDA with the opportunity to pursue the aggrieved employee’s claims itself. Second, the notice is also mailed to the employer, which puts the employer on notice of the alleged claims and triggers the employer’s obligation to respond to the claims, thereby allowing the LWDA to make an informed decision on whether to pursue the claims. However, plaintiff’s lawyers are beginning to stray beyond their notice letter’s proposed issues and aggrieved employees in discovery. By covertly enlarging the scope of the proposed aggrieved employees or the underlying claims beyond what was in the notice letter, these actions infringe on the LWDA’s rights to pursue the litigation itself.

If the LWDA elects not to pursue the claims, an aggrieved employee may act as a Private Attorney General and is allowed to pursue fines directly normally only available to the state. Notably, an aggrieved employee may seek civil penalties not only for violations that impacted him or her personally, but also for violations of “other current or former employees.”

Any penalties that are recovered through a PAGA claim must be split with the state. A

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13 LC §2699.3(a)(1).
14 LC §2699.3(a)(2)(A). If the LWDA does not respond to the notice within 65 calendar days, the employee can proceed with his or her claims. Id.
15 Williams v. Superior Court, 3 Cal.5th 531, 545-46 (2017).
16 LC §2699(a).
total of 75% of any recovery must be paid to the LWDA. The remaining 25% is distributed to the aggrieved employees.\textsuperscript{17} PAGA also provides for the payment of attorneys' fees to an employee who successfully brings the suit.\textsuperscript{18}

PAGA claims encompass the violation of more than one hundred Labor Code sections identified by list in LC §2699.5. This category includes, among other things, waiting time penalties under LC §203, meal and rest break premiums under LC §226.7, and violations of LC §1198, which makes it illegal to employ an employee “under conditions prohibited by the wage order.”\textsuperscript{19} Notably, the inclusion of LC §1198 allows employees to file PAGA claims on sections of the wage order that do not otherwise provide a private right of action. Some recent examples of this include lawsuits based on an employer's alleged failure to provide employees with suitable seating,\textsuperscript{20} or failure to maintain comfortable temperatures at work.\textsuperscript{21}

The scope of PAGA actions continues to be hotly litigated. Most recently, California courts are fumbling with their jurisdiction to send actions to arbitration when PAGA violations are alleged. PAGA claims cannot be arbitrated. However, what happens when an employee alleges wage and hour violations and seeks PAGA penalties? Are claims for PAGA penalties stayed while the remaining claims are arbitrated? Typically, yes. What if the employee executed an arbitration agreement to arbitrate all claims on an individual basis when the employee was hired? A recent California decision, Correia

\textsuperscript{17} LC §2699(i).
\textsuperscript{18} LC §2699(g).
\textsuperscript{19} California’s Industrial Welfare Commission (“IWC”) publishes industry-specific and general wage orders. These wage orders consist of additional regulations governing wages, hours, and working conditions.
\textsuperscript{20} The landmark California Supreme Court case interpreting the “suitable seating” order, Kilby v. CVS Pharmacy, Inc., 63 Cal.4th 1 (2016), requires courts to take into account the employee’s need for a seat balanced against an “employer’s considerations of practicability and feasibility.”
\textsuperscript{21} Sections 14 and 15 of most Wage Orders, respectively.
v. NB Baker Elec., Inc., held that a former employer was not entitled to compel arbitration of PAGA claim based on the parties’ pre-dispute arbitration agreement absent evidence the LWDA consented to waiver of right to bring PAGA claim in court. The Correia court’s rationale was, because the aggrieved employee stepped in the shoes of the LWDA to pursue the PAGA penalties, only the LWDA could waive its right to proceed to arbitration. In Zakaryan v. Men’s Warehouse, Inc., the Appellate Court reaffirmed this point and also emphasized that an employee cannot “split” his individual damages for a violation from the associated PAGA penalties for that same violation by arbitrating the individual damages but leaving the PAGA penalties in court.

Other unresolved questions include: what if two employees separate file actions against an employer for the same violations and seek PAGA penalties? Who gets to proceed? What happens if an employee settles but the other employee is dissatisfied with the settlement?

V. The Intersection of Class versus Representative PAGA Actions
A PAGA action is not a class action. Therefore, PAGA representative actions present several other challenges for employers. For one thing, there is no requirement that a PAGA plaintiff undergo the class certification process in state court. Thus, arguments that might be relevant to defeat certification of a putative class claim will have no impact on the representative action under PAGA. Further, federal cases interpreting PAGA have held it allows for individual liability against the person or persons who “caused” the violation of the Labor Code. Therefore, although it is not yet settled in California,

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24 Arias v. Superior Court, 46 Cal.4th 969, 975 (2009) (the class certification “requirements need not be met when an employee’s representative action against an employer is seeking civil penalties under the [PAGA].”).
managers or owners who “cause” a violation of the Labor Code could potentially be on
the hook, individually, for damages and attorneys’ fees under PAGA.

PAGA-only claims do not have the same procedural due process protections afforded in
class actions which protect both employers and absent employees. This distinction is
important for establishing the appropriate scope of discovery in a PAGA-only action and
Plaintiff’s ability to prosecute a statewide action. For example, a PAGA plaintiff must
prove at least one violation for each employee, per pay period. If the PAGA plaintiff
cannot prove the alleged Labor Code violations with respect to other employees’
experiences, there is a strong basis for limiting the PAGA claims and any accompanying
discovery (which could become a fishing expedition). Similarly, PAGA cases with an
unknowledgeable plaintiff can quickly become unmanageable, resulting in a waste of
judicial (and party) resources. Courts have dismissed representative actions where the
named plaintiff is not similarly aggrieved to the aggrieved-employee group, and/or
where individualized issues fatally bog the case. This is contrasted with the traditional
class action, which does not require personal knowledge on behalf of all absent class

26 Arias v. Superior Court, 46 Cal.4th 969, 974 (2009); Baumann v. Chase Inv. Servs. Corp., 747 F.3d 117, 1122 (9th Cir. 2014)(“the California Supreme Court has authoritatively addressed [the] issue, holding that PAGA actions are not class actions under state law”).
27 LC §2699(f)(2) (amount of penalty increases sequentially for each aggrieved employee per pay period).
28 Williams, 3 Cal.5th at 544 (suggesting PAGA discovery can be limited).
members.

Courts are required to review and approve any proposed settlement that purports to release PAGA claims. If the PAGA claims are asserted as part of a wider class action which includes causes of action for other Labor Code violations, the parties must allocate a certain portion of the total settlement towards the PAGA claims. Employees are incentivized to minimize any PAGA allocation, because they are forced to split that amount with the state. But California courts are becoming increasingly careful in scrutinizing PAGA settlements to ensure the allocation is reasonable in light of the penalties which could have potentially been collected had the case been successfully tried to verdict.

VI. Avoiding (Or Limiting Exposure To) Class and Representative Claims.

Nothing in life is certain, except death, taxes, and aggrieved employees. Considering the many California-specific employment laws and the available penalties, employers with California-based employees should take additional steps to limit their exposure to class and representative actions.

Now more than ever, it is critical for employers to review their written policies to verify compliance with the California Labor Code and the various IWC Wage Orders. The existence of a single policy that is unlawful can be considered substantial evidence to justify class treatment. Thus, employers should work with an experienced labor and employment attorney to review their written policies to limit their potential exposure in the event a class or representative action is ever filed.

30 LC § 2699(l).
31 Brinker Restaurant Corp v. Superior Court, 53 Cal.4th 1004, 1033 (2012) (“The theory of liability—that Brinker has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law—is by its nature a common question eminently suited for class treatment.”).
But employers should not stop with updating their written policies. Evidence of an unlawful practice, commonly applied by the employer, can also justify class treatment. For that reason, employers should take steps to ensure that all of their managers and supervisors are adequately trained, and that their employment practices comply with California law. This is especially true for national employers, who may have managers or supervisors who transfer from state to state. Regardless of what the written policy says, an employer can get themselves into trouble where their employment practice itself is unlawful.

Employers should also audit their timekeeping policies to make sure that all hours worked are being accurately recorded, including clocking in and out for meal periods. Many class actions filed in California involve some aspect of failing to record all hours worked, including claims for failure to pay overtime, meal and rest break violations, and off-the-clock work claims. An employer’s best defense to these claims is often through time records (i.e. showing when meal break was taken). Thus, employers should review their timekeeping practices to verify that the information is accurate and reliable in the event it is needed to defend against a class or representative action.

Employers should also take a hard look at their ability (and the practicality) of providing employee seating. The latest wave of PAGA claims have focused on seating issues. When analyzing whether seating is necessary and appropriate, employers should consider the nature of the work (does it reasonably permit seating?), the physical layout of the space, whether seats would interfere with other standing tasks, whether the transition from standing to seating would interfere with job work, and whether seated work would impact the quality or effectiveness of overall job performance.
Finally, employers should review their pay statements to verify that they contain all of the information required under California law. This is a relatively straightforward process, but the failure to do so can expose an employer to class-wide liability for damages and civil penalties for every pay period in which the pay statements are not in compliance.

Although an employer cannot insulate themselves entirely from class liability, these steps can go a long way towards preventing class and representative claims from being filed, and in defending the employer in the event such an action is ever filed.

If, however, a PAGA action is filed, the employer and its counsel should pay careful attention to how the PAGA aggrieved employees are identified and ensure the plaintiff is held to the PAGA description provided to the LWDA. Plaintiff’s failure to do so could result in a “failure to exhaust administrative remedies” defense.